

1 **UNITED STATES COURT OF APPEALS**

2
3 **FOR THE SECOND CIRCUIT**

4
5 August Term, 2009

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8 (Submitted: October 23, 2009 Decided: November 25, 2009)

9
10 Docket No. 08-2111-cv

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12 - - - - -x

13
14 SHEMTOV MICHTAVI,

15
16 Plaintiff-Appellant,

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18 - v.-

08-2111-cv

19
20 NEW YORK DAILY NEWS, THE POLISH DAILY NEWS,
21 MATHEW KALMAN, DOES #1-#10

22
23 Defendants-Appellees.

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25 - - - - -x

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27 Before: JACOBS, Chief Judge, KEARSE, Circuit
28 Judge, and GARDEPHE,* District Judge.

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30 Appeal from a judgment of the United States District
31 Court for the Southern District of New York (Sand, J.),
32 dismissing a complaint alleging libel and emotional
33 distress. The defendant newspapers reported that the

*Paul G. Gardephe, of the United States District Court for the Southern District of New York, sitting by designation.

1 plaintiff, who is incarcerated, planned to cooperate with
2 prosecutors. The district court held that the reports could
3 not be defamatory under New York law. We affirm.

4 Shemtov Michtavi, pro se, White
5 Deer, Pennsylvania, for Appellant.

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7 Marion Bachrachm, Dana Moskowitz,
8 DePetris & Bachrach, LLP, New York,
9 NY; Laura R. Handman, Davis Wright
10 Tremaine LLP, Washington DC; Anne B.
11 Carroll, Deputy General Counsel,
12 Daily News, L.P., New York, NY, for
13 Appellees.

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16 DENNIS JACOBS, Chief Judge:

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18 Shemtov Michtavi, pro se, alleges defamation and
19 intentional infliction of emotional distress based on news
20 reports, published by the New York Daily News and the Polish
21 Daily News, that Michtavi, who is incarcerated, planned to
22 cooperate with prosecutors. Michtavi appeals from the
23 judgment of the United States District Court for the
24 Southern District of New York (Sand, J.) dismissing the
25 complaint for failure to state a claim on which relief could
26 be granted, under Fed. R. Civ. P. 12(b)(6). Michtavi v. New
27 York Daily News, No. 06-Civ-8260, 2008 U.S. Dist. LEXIS
28 24997, *2-5 (S.D.N.Y. Mar. 12, 2008). The district court
29 held that the reports could not be defamatory under New York

1 law, and we agree.

2 **I**

3 Michtavi is serving a twenty-year prison sentence for
4 narcotics offenses. In March 2006, the defendant newspapers
5 reported [i] that he was a "key lieutenant" of Ze'ev
6 Rosenstein, an organized crime figure, and [ii] that
7 Michtavi planned to cooperate with prosecutors and testify
8 against Rosenstein. Id. at *1-2.

9 Michtavi, a citizen of Israel, invoked diversity
10 jurisdiction. This matter is governed by New York law.

11 Michtavi does not contest on appeal the dismissal of
12 any claim stemming from the statement that he was a "key
13 lieutenant" of Rosenstein. Any such claim is waived.

14 Norton v. Sam's Club, 145 F.3d 114, 117 (2d Cir. 1998).

15 Michtavi's remaining claim, stemming from the report that he
16 planned to cooperate with the authorities, fails on the
17 ground that the statement is, as a matter of law, not
18 defamatory.

19 **II**

20 "Whether particular words are defamatory presents a
21 legal question to be resolved by the court in the first
22 instance." See Aronson v. Wiersma, 65 N.Y.2d 592, 594 (N.Y.

1 1985). Under New York law, a statement is defamatory only
2 if it would expose an individual to shame "in the minds of
3 right-thinking persons." Kimmerle v. New York Evening
4 Journal, Inc., 186 N.E. 217, 218 (N.Y. 1933); see also
5 Celle v. Filipino Reporter Enters., 209 F.3d 163, 177 (2d
6 Cir. 2000). It is becoming increasingly hard to ascertain
7 as a matter of law what a right-thinking person would think,
8 and the line of cases has drawn some scholarly criticism.
9 See, e.g., Lyrisa Barnett Lidsky, Defamation, Reputation,
10 and the Myth of Community, 71 Wash. L. Rev. 1, 20-28 (1996).

11 To test for defamation, courts construe the words "as
12 they would be read and understood by the public to which
13 they are addressed." November v. Time, Inc., 194 N.E.2d
14 126, 128 (N.Y. 1963). The newspapers may not have been
15 addressed specifically to the prison population, but that is
16 clearly the group whose good opinion matters to Michtavi.
17 However, "[t]he fact that a communication tends to prejudice
18 another in the eyes of even a substantial group is not
19 enough [to make the statement defamatory] if the group is
20 one whose standards are so anti-social that it is not proper
21 for the courts to recognize them." Restatement (Second) of
22 Torts § 559, cmt. e (1977).

1 The population of right-thinking persons unambiguously
2 excludes "those who would think ill of one who legitimately
3 cooperates with law enforcement." Agnant v. Shakur, 30 F.
4 Supp. 2d 420, 424 (S.D.N.Y. 1998) (Mukasey, J.) (noting that
5 every American court surveyed has held that identifying
6 someone as a government informant is not defamatory as a
7 matter of law); see also Connelly v. McKay, 28 N.Y.S.2d 327,
8 329-30 (Sup. Ct. N.Y. County 1941) ("At most the language
9 claimed to have been used accuses the plaintiff of giving
10 information of violations of the law to the proper
11 authorities. Are such acts reprehensible? Is such language
12 defamatory? This court thinks not.").

13 We therefore agree with the district court that as a
14 matter of law the defendants' reports were not defamatory.
15 Michtavi's other arguments are likewise without merit. For
16 the foregoing reasons, we affirm.